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Pesticide Use and Water Quality: Are the Laws Complementary or in Conflict?

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Summary

This report provides background on the emerging conflict over interpretation and implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and the Clean Water Act (CWA). For the more than 30 years since they were enacted, there has been little apparent conflict between them. But their relationship has recently been challenged in several arenas, including the federal courts and regulatory proceedings of the Environmental Protection Agency (EPA). In this report, a brief discussion of the two laws is followed by a review of the major litigation of interest. EPA's efforts to clarify its policy in this area and a January 2005 rulemaking proposal are discussed, as well as possible options for EPA and Congress to address the issues. This report will be updated as warranted.

FIFRA governs the labeling, distribution, sale, and use of pesticides, including insecticides and herbicides. Its objective is to protect human health and the environment from unreasonable adverse effects of pesticides. It establishes a nationally uniform labeling system requiring the registration of all pesticides sold in the United States, and requiring users to comply with the national label. The CWA creates a comprehensive regulatory scheme to control the discharge of pollutants into the nation's waters; the discharge of pollutants without a permit violates the act.

Five federal court cases testing the relationship between FIFRA and the CWA have drawn attention. In two cases concerning pesticide applications by agriculture and natural resources managers, the U.S. Ninth Circuit Court of Appeals held that CWA permits are required for at least some discharges of FIFRA-regulated pesticides over, into, or near U.S. waters, and it held in a third case that the specific pesticide was not a chemical waste, thus no permit was required. Two other cases involve the use of pesticides for mosquito control. In these cases, the U.S. Second Circuit Court of Appeals has not yet specifically addressed whether the application of FIFRA-approved pesticides requires a CWA discharge permit, but the cases are pending.

The judicial rulings have alarmed a range of stakeholders who fear that requiring CWA permits for pesticide application activities would present significant costs, operational difficulties, and delays. Pressed by many to clarify its long-standing principle that CWA permits are not required for using FIFRA-approved products, EPA in January 2005 issued an Interpretive Statement and Guidance memorandum that is at odds with several federal court rulings, and it simultaneously proposed a rulemaking to codify that principle in regulations. EPA's actions are strongly opposed by environmental activists who argue that FIFRA does not protect water quality from harmful pollutant discharges, as the CWA is intended to do.

EPA's likely options involve whether it will continue to rely solely on interpretive guidance to assist pesticide users and the courts on CWA-FIFRA questions, or whether it will also finalize a rule addressing the issues. Some believe that the controversy will only be resolved by congressional action to clarify the intersecting scope of the Clean Water Act and FIFRA. Legislation intended to do so has been introduced in the 109th Congress (H.R. 1749 and S. 1269).

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Introduction

It has been noted that "[t]he potential for overlapping and potentially conflicting regulatory scope between federal statutes is common, especially in the heavily regulated area of environmental protection."[1] This potential is receiving attention today in connection with implementation of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[2] and the Federal Water Pollution Control Act (Clean Water Act, CWA).[3] FIFRA requires the Environmental Protection Agency (EPA) to regulate the sale and use of pesticides in the United States through registration and labeling. The CWA is the principal federal law governing pollution in the nation's surface waters.

Pesticides used to control weeds, insects, and other pests receive public attention because of potential impacts on humans and the environment. Depending on the chemical, possible health effects from overexposure to pesticides include cancer, reproductive or nervous-system disorders, and acute toxicity. Similar effects are possible in the aquatic environment. Recent studies suggest that some pesticides can disrupt endocrine systems and affect reproduction by interfering with natural hormones. However, many pesticides and their breakdown products do not have standards or guidelines, and current standards and guidelines do not yet account for exposure to mixtures and seasonal pulses of high concentrations. Effects of pesticides on aquatic life are a concern, because intensive surveys done by the U.S. Geological Survey found that more than one-half of streams sampled had concentrations of at least one pesticide that exceeded an EPA guideline for the protection of aquatic life. Whereas most toxicity and exposure assessments of pesticides are based on controlled experiments with a single contaminant, the U.S. Geological Survey sampling found that most contamination of waterbodies occurred as pesticide mixtures.[4]

For the more than 30 years since Congress enacted FIFRA and the Clean Water Act, there has been little apparent direct conflict between them. EPA's operating principle during that time has been that pesticides used according to the requirements

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[1] Randall S. Abate and Matthew T. Stanger, "Pesticides and Water Don't Mix: Addressing the Need to Close a Regulatory Gap Between FIFRA and the CWA," *Environmental Law Reporter News & Analysis*, January 2005, p. 10056.

[2] 7 U.S.C. §§136-136y.

[3] 33 U.S.C. §§1251-1387.

[4] U.S. Department of the Interior, U.S. Geological Survey, *The Quality of Our Nation's Waters, Nutrients and Pesticides*, USGS Circular 1225, 1999, pp. 3-9.

of FIFRA do not require regulatory consideration under the CWA. EPA has never required CWA permits for use of FIFRA-approved materials, and EPA rules currently do not specifically address the issue. However, EPA's interpretation and operating practice regarding the relationship between the two laws has recently been challenged in several arenas. Federal courts have been one of two battlegrounds so far where the potential conflict between the regulatory scope of these two laws has been waged. EPA regulatory proceedings have been the second battleground area. Congressional action could add a third testing of the issues.

At issue is how FIFRA-approved pesticides that are sprayed over and into waters are regulated and, specifically, whether the FIFRA regulatory regime is sufficient alone to ensure protection of water quality or whether such pesticide application requires approval under a CWA permit. The issue arose initially over challenges to some routine practices in the West (weed control in irrigation ditches and spraying for silvicultural pest control on U.S. Forest Service lands). It subsequently drew more attention in connection with efforts by public health officials throughout the country to combat mosquito-borne illnesses such as West Nile virus. The court decisions have created uncertainty over whether application of pesticides and herbicides to waterbodies requires a water discharge permit. EPA is trying to promulgate policy to clarify the relationship of the two laws and to address conflicts resulting from several judicial rulings. A related issue of interest to many pesticide applicators, but not yet addressed by EPA policy, concerns pesticides that unintentionally impact waterbodies through drift or migration from nearby land, such as a field of crops.

This report provides background on the emerging conflict over interpretation and implementation of FIFRA and the Clean Water Act. A brief discussion of the two laws is followed by a review of the major litigation of interest. EPA's efforts to clarify its policy in this area and a January 2005 rulemaking proposal are discussed, as well as possible options for EPA and Congress to address the FIFRA-CWA issues.

The Laws

FIFRA is a regulatory statute governing the licensing, distribution, sale, and use of pesticides, including insecticides, fungicides, rodenticides, and other designated classes of chemicals. Its objective is to protect human health and the environment from unreasonable adverse effects of pesticides. To that end, it establishes a nationally uniform pesticide labeling system requiring the registration of all pesticides and herbicides sold in the United States, and requiring users to comply with conditions of use included on the national label. A FIFRA label encompasses the terms on which a chemical is registered, and its requirements become part of FIFRA's regulatory scheme. In registering the chemical, EPA makes a finding that the chemical "when used in accordance with widespread and commonly recognized practice ... will not generally cause unreasonable adverse effects on the environment" (7 U.S.C. §136a(c)(5)(D)).

EPA reviews scientific data submitted by pesticide manufacturers on toxicity and behavior in the environment to evaluate risks and exposure associated with the pesticide product's use and takes into account the costs and benefits of various pesticide uses. If a registration is granted, the agency specifies the approved uses and

conditions of use, which the registrant must explain on the product label. EPA may classify and register a pesticide product for restricted use (those judged to be more dangerous to the applicator or to the environment which can only be applied by or under the direct supervision of a person who has been trained and certified) or for general use. FIFRA preempts state, local, and tribal regulations stricter than or different from EPA rules with respect to labeling requirements, but allows states and localities to adopt more restrictive conditions with regard to sale and use.

Use of a pesticide product in a manner not consistent with its label is prohibited, and the law provides civil and criminal penalties for violations. Under FIFRA, EPA generally enforces the law's requirements. However, the law also gives states with adequate enforcement procedures, laws, and regulations primary authority for enforcing FIFRA provisions related to pesticide use.

The objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To that end, it creates a comprehensive regulatory scheme to control the discharge of waste and pollutants; the discharge of pollutants into waters of the United States without a permit violates the act. The permit requirement is at the heart of the act's compliance and enforcement strategy. Several aspects of these core requirements in the law are important to evaluating whether the CWA applies to specific activities, including whether there is a discharge from a point source (a discrete conveyance such as a pipe, ditch, container, vessel, or other floating craft), whether the discharge is made into waters of the United States, and whether the material discharged is a pollutant; all of these terms are defined in the act. Especially key in the current context is whether pesticides are pollutants under the act. This issue has been central to much of the judicial and regulatory debate over whether the two laws, CWA and FIFRA, are complementary or in conflict. CWA Section 502(6) (33 USC §1362(6)) defines pollutant thus:

> The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

Section 402 of the act establishes the National Pollutant Discharge Elimination System (NPDES) permitting requirement, which regulates the lawful discharge of pollutants. Discharges are permitted under the act if they are authorized under a NPDES permit that meets CWA requirements, including protecting the receiving waters. NPDES permits specify limits on what pollutants may be discharged and in what amounts. They also include monitoring and reporting requirements. They are either individual case-by-case permits or general permits applicable to similar categories of activities and similar waste discharges. Under the CWA, qualified states issue NPDES permits to regulated sources and enforce permits, and the law allows states to adopt water quality requirements more stringent than federal rules. As of 2005, 45 states had been delegated authority to administer the permit program; EPA issues discharge permits in the remaining states.

The NPDES permit is the act's principal enforcement tool. EPA may issue a compliance order or bring a civil suit in U.S. district court against persons who violate the terms of a permit, and stiffer penalties are authorized for criminal violations of the act. As a practical matter, the majority of actions taken to enforce the law are undertaken by states, both because states issue the majority of permits to dischargers and because the federal government lacks the resources for day-to-day monitoring and enforcement. In addition, individuals may bring a citizen suit in U.S. district court against persons who violate the terms of a CWA-authorized permit or who discharge without a valid permit. FIFRA does not authorize citizen suits.

Throughout the United States, pesticides often are applied in, onto, or near waterbodies to control weeds and insects. Whether those pesticides are adversely affecting water quality has not been a disputed issue until recently. It has been EPA's long-standing practice and interpretation of the laws that a CWA permit is not required when pesticide application is done in a manner consistent with FIFRA and its regulations. But that interpretation has been challenged in several lawsuits brought since the late 1990s that have been decided since 2001.

The Litigation

Five federal court cases testing the relationship between FIFRA and the CWA have drawn the most attention, three in the Ninth Circuit Court of Appeals in the West concerning pesticide applications by agricultural and natural resource managers, and two in the Second Circuit Court of Appeals in the East involving the use of pesticides by government and public health authorities for mosquito control. These cases have been brought principally under citizen suit provisions of the Clean Water Act. So far, two of the Ninth Circuit decisions have held that CWA permits are required for at least some activity involving the point source discharge of FIFRA-regulated pesticides over or into waters of the United States, and the third held that a permit was not required because the specific pesticide was not a chemical waste. The Second Circuit, while not yet holding that a permit is required, appears to some observers to be less willing to interpret the CWA to require NPDES permits for application of FIFRA-regulated chemicals.[5] Thus far, this appeals court has remanded two cases to district courts for further proceedings involving related issues; it has not yet specifically addressed whether the application of FIFRA-approved pesticides requires a CWA discharge permit, as the Ninth Circuit has.

The Ninth Circuit Cases. The first of the major cases on these issues involved application of herbicides in irrigation ditches. In the case, a major issue was whether the application of pesticides constitutes the discharge of a pollutant. Environmental groups challenged application of an aquatic herbicide called Magnicide H to kill weeds and algae and sought to require that the applicator, a municipal corporation that operates a system of irrigation canals in Oregon, obtain an NPDES permit.

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[5] Randall S. Abate and Matthew T. Stanger, "Pesticides and Water Don't Mix: Addressing the Need to Close a Regulatory Gap Between FIFRA and the CWA," *Environmental Law Reporter News & Analysis*, January 2005, p. 10055.

The Ninth Circuit Court of Appeals endorsed the lower court's ruling that the pesticide was a pollutant under the CWA, and that the irrigation canals into which the pesticide was being sprayed are "waters of the United States." But it rejected the lower court's holding that a CWA permit was not required because the pesticide was properly regulated by FIFRA and had an EPA-approved FIFRA label. The appeals court ruled that FIFRA and CWA have different purposes and that, as such, neither could be controlling on the application of the other. The court said that FIFRA creates a comprehensive regulatory scheme for the labeling of pesticides, requiring that all insecticides and herbicides sold in the United States be registered with the EPA. It and the CWA have different, although complementary, purposes, the court said, and using a pesticide with a FIFRA-approved label does not obviate the need to obtain a CWA permit. The FIFRA label is the same nationwide. The CWA permit considers local environmental conditions, which the FIFRA label does not. Thus, a nationwide label on a FIFRA-regulated chemical could not be controlling on whether a CWA permit is required, because it does not account for location-specific requirements. The court reversed the district court's grant of summary judgment in favor of the defendants (*Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001)).

Several of the states within the Ninth Circuit subsequently took actions to respond to this ruling. California and Washington amended their water quality program rules to require NPDES permits for pesticide applicators. Oregon did not mandate permits, but suggested that pesticide applicators obtain state-issued permits to protect against lawsuits.

The second major case in the West involved an annual U.S. Forest Service (USFS) aerial spray program over national forest lands in Oregon and Washington. Environmental groups filed a lawsuit challenging the spraying program, saying that the environmental impact statement (EIS) prepared by the USFS was inadequate and that the Forest Service had failed to obtain a CWA permit, which they argued is required for this type of aerial spraying. The appeals court reversed the district court's order of summary judgment for the Forest Service and instructed the lower court to enter an injunction prohibiting the federal agency from further spraying until it acquires an NPDES permit and completes a revised EIS (*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), *cert. denied*). The court disagreed with the argument of the Forest Service that the spraying is nonpoint source water pollution, which does not require an NPDES permit. The court held that the insecticides meet the CWA definition of "pollutant" and that the application came from an aircraft equipped with spraying apparatus, thus meeting all of the elements of the CWA's definition of point source pollution.

In September 2003, the EPA General Counsel issued a legal memorandum to Region 9 officials (involving Oregon, Washington, Idaho, Montana, and Hawaii) responding to the *Forsgren* case. The memorandum said that EPA disagreed with the court's holding in the case and that outside the Ninth Circuit, EPA would continue its long-standing interpretation of FIFRA and the CWA. Within the Ninth Circuit, the memo said, EPA would not acquiesce to the ruling in the case of materials other

than pesticides (such as those used for fire control), or in circumstances where pesticides are not applied directly over and into waters of the United States.[6]

The third and most recent Ninth Circuit case involved an effort by the Montana Department of Fish, Wildlife and Parks to intentionally apply the pesticide antimycin to a river in order to remove non-native trout species and thus to allow re-introducing a threatened fish species into the river. The director of the department was sued under the citizen suit provision of the CWA by a citizen who sought to require the department to obtain an NPDES permit before applying the pesticide.

The court held in this instance that no NPDES permit was required, because the facts of the case demonstrated that, following application as intended, the antimycin dissipated rapidly, leaving no excess portions or residual chemical that should be characterized as chemical waste, and thus is not a pollutant under the act (*Fairhurst v. Hagener*, D.C. No. CV-03-0067-SEH, 9th Cir., Sept. 8, 2005). Intentionally applied and properly performing pesticides are not pollutants, the court said.

The court distinguished this case from its ruling in *Headwaters*, saying that the factual scenarios differ, because "in that case the 'chemical waste' for which a NPDES permit was required was not a pesticide serving a beneficial purpose and intentionally applied to water, but was a chemical that remained in the water after the Magnicide H performed its intended, beneficial function." (Slip opinion at page 12683) Further, the court stated that its analysis accords with EPA's construction of the CWA's definition of "chemical waste" in the context of intentionally applied pesticides, and that the agency's 2003 Interim Statement and Guidance addressing the issue (discussed below, page 8) is entitled to some deference. EPA's interpretation as presented in the Interim Statement is reasonable and not in conflict with the expressed intent of Congress, the court said.

The Second Circuit Cases. Two cases in the Second Circuit involve the use of pesticides for mosquito control. In the first case, several residents of the Town of Amherst, N.Y., sought to halt aerial application of pesticides without a CWA permit. The district court initially granted the defendant's motion to dismiss the case, stating that spray drift is not chemical waste under the CWA and that the pesticide use was best regulated under FIFRA. But the appeals court remanded the case to the District Court on the basis that the lower court had acted on an incomplete record, had unnecessarily limited discovery, and had failed to consider threshold questions of law (*Altman v. Town of Amherst, N.Y.*, 47 Fed. Appx. 62 (2d Cir. 2002)). Although this ruling may not be cited as precedent, it is notable in that the court invited EPA to offer its views on the policy and legal questions, thus drawing the attention of EPA and stakeholder groups. The court stated:

> Until the EPA articulates a clear interpretation of current law — among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits ... — the question of whether properly used pesticides can become pollutants that violate the CWA

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[6] Robert Fabricant, EPA General Counsel, "Interpretive Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders v. Forsgren* on Application of Pesticides and Fire Retardants," memorandum, Sept. 3, 2003, 7 pp.

> will remain open. Participation by the EPA in this litigation in any way that permits articulation of the EPA's interpretation of the law in this situation would be of great assistance to the courts.[7]

The second pertinent case in the Second Circuit also involved the use of pesticides for control of mosquitoes. Plaintiffs in the case, a citizens group, sought an injunction to halt the aerial and ground spraying, arguing that although the pesticides were properly regulated under FIFRA, the spraying program involved the discharge of a pollutant without a CWA permit, and thus was a violation of that law. While the federal district court ruled that FIFRA's refusal to allow enforcement by citizen suit should prevail over the CWA's allowance of such suits unless the alleged violation of the CWA also constitutes a substantial violation of FIFRA, the appeals court disagreed. It held that the CWA authorizes any citizen to bring suit to enforce its requirements, regardless of whether the claimed CWA violation also violated FIFRA (*No Spray Coalition v. City of New York*, 351 F.3d 602 (2d Cir. 2003)). The Second Circuit remanded the case to the district court for further proceedings on the CWA claims. In June 2005 the district court rejected motions by the parties to dismiss the case, saying that disputed issues of material fact exist as to whether the city has discharged a pollutant into navigable waters without a permit.

Other Litigation. Other lawsuits have followed these cases. For example, private citizens who operate an organic fruit farm in Gem County, Idaho, brought suit against the local mosquito abatement district there, seeking to require a CWA permit for pesticide spraying. Finding itself in the proverbial spot "between a rock and a hard place," the mosquito abatement district applied for a permit from EPA, which the agency declined to issue, based on its long-standing policy and legal interpretation. Thereafter, the mosquito abatement district filed a lawsuit against EPA in an attempt to obtain a declaration that a CWA permit is not needed and to avoid the citizen suit litigation, which is pending in federal court in Idaho. The mosquito abatement district asked the federal court either for a judgment saying that no permit is required or, if the court were to determine otherwise, an order directing EPA to process its CWA permit application. On January 4, 2005, the federal district court in the District of Columbia dismissed the case because the mosquito abatement district and EPA agree that no CWA permit is required for pesticide applications that are consistent with FIFRA (*Gem County Mosquito Abatement District v. EPA*, Civ. Action No. 03-2179, D.D.C. Jan. 4, 2005). The mosquito abatement district has appealed the D.C. district court's ruling. In the meantime, fact-finding is underway in the citizen suit litigation in federal court in Idaho.

Twice since 2004, citizen groups have given notice, as required by the Clean Water Act, of possible lawsuits to expand the precedent from the Ninth Circuit cases to other types of operations. The noticed actions, in August 2004 and March 2005, were threatened against Maine blueberry farmers for failing to obtain a CWA permit for spraying pesticides that may drift off-target from land into waterbodies. In response to the litigation pressure, however, both farmers subsequently announced plans to cease aerial spraying and instead rely on ground spraying, until such time as government or the courts clarify the law.

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[7] 47 Fed. Appx. at 67.

EPA's Regulatory Responses

The rulings by the Ninth Circuit in the *Headwaters* and *Forsgren* cases and possible endorsement by other courts have greatly alarmed a range of stakeholders in the regulated community, including forestry, agriculture, and pesticide applicators, as well as municipal and public health officials concerned with the need to control mosquitos and other vectors associated with diseases such as West Nile virus and malaria. They feared that CWA permit requirements would be extended to agricultural and other activities that have not traditionally been regulated under the CWA. They argue that if permits tailored to particular circumstances are deemed necessary, such requirements would present significant costs, operational difficulties, and delays to applicators. They also would tax limited federal and state CWA permitting resources. In their view, requiring permits will not be environmentally helpful, but the expense and long delays of permitting proceedings will hamper programs that are needed for controlling pests that threaten public health and crops.

EPA's Interim Guidance. Since the *Altman v. Town of Amherst* ruling in 2002, industry, states, and others, including some in Congress, have pressed EPA to clarify the emerging conflicts over the two laws. EPA responded in July 2003 with an Interim Statement and Guidance memorandum.[8] In it, EPA presented its interpretation of whether an NPDES permit is required for the application of pesticides that comply with FIFRA. EPA's position was that application of pesticides either directly in U.S. waters or aerially above or near the waters to control pests does not require a CWA permit, so long as the use is done in compliance with relevant FIFRA requirements. The memorandum acknowledged the federal court's holding to the contrary in the *Headwaters v. Talent* case, but then described why EPA concludes otherwise. Under the agency's evaluation, pesticides applied in a manner consistent with FIFRA do not constitute either chemical wastes or biological materials under the definition of pollutant in Section 502(6) of the CWA. The rationale for this position is that it is consistent with over 30 years of CWA administration.[9] The memorandum noted that pesticide applications in violation of FIFRA, that is, not used or applied according to applicable labeling requirements, would be subject to all relevant statutes, including the Clean Water Act. EPA invited public comments on the interim guidance statement through October 14, 2003, but the position stated in the memorandum took effect immediately and would apply until EPA issues a final position on the matter.

The Interim Statement addresses in detail the question of whether, in EPA's view, pesticides are pollutants, within the meaning of CWA Section 502(6), since the discharge of pollutants is regulated under the act. In the memorandum, EPA argues that chemical pesticides are not wastes, and therefore are not pollutants, because they are "EPA-evaluated products designed, purchased and applied to perform their

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[8] U.S. Environmental Protection Agency, "Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA," 68 *Federal Register* 48385, Aug. 13, 2003.

[9] Ibid., p. 48387.

intended purpose of controlling target organisms in the environment."[10] Neither does EPA believe that biological pesticides (e.g., products derived from plants, fungi, bacteria, or other non-man-made synthesis and which can be used for pest control that usually do not have toxic effects on animals and people, compared with many chemical pesticides) are pollutants. Both chemical and biological pesticides are intended to perform essentially similar functions, and it would be "nonsensical" to treat chemical and biological pesticides differently.[11]

Responses to the Interim Guidance. The guidance was issued in part to clarify the agency's interpretations of legal rulings on the issue and to remove any uncertainty regarding application of herbicides and pesticides to combat vector-borne diseases that are transported by mosquitoes. However, EPA's guidance satisfied few stakeholders, for differing reasons.

Environmental activists strongly objected to EPA's position, which they argue is contrary to the recent judicial rulings. These groups reiterated points made by the Ninth Circuit court in the *Headwaters* and *Forsgren* rulings, namely that chemical and biological pesticides are pollutants within the meaning of the CWA, as the law defines pollutants broadly and includes, among other substances, chemical wastes, biological materials, and agricultural wastes. As that court has declared, environmentalists said, FIFRA does not override the CWA, and the two statutes must work in tandem to prevent injury to aquatic life. They also argue that EPA is wrongly deciding that materials with beneficial uses should not be construed as pollutants under the CWA.

Environmentalists' objections also go to the policy problems of relying on FIFRA to protect water quality from pesticide applications, as that would be the result of EPA's position. What that position comes down to, critics says, turns on whether the pesticide application conforms procedurally with FIFRA requirements, not what is the water quality impact of that pesticide. Other concerns raised by critics include the fact that while the FIFRA registration process calls for ecological risk assessment that may be adequate for producing nationally applicable labels, it does not ensure that local water quality standards are maintained and does not account for additive or synergistic effects of multiple pollutants discharged to a particular waterbody. Environmentalists argue that the CWA provides the means to determine whether, and under what conditions, it is safe to discharge a particular pesticide into a particular body of water, and that FIFRA's nationally uniform labeling system cannot do that. FIFRA is not specifically charged with ensuring the chemical, physical, and biological integrity of U.S. waterways, and satisfaction of a pesticide's FIFRA labeling criteria does not automatically satisfy water quality concerns, as the NPDES permit process is intended to do. They also maintain that FIFRA fails to consider the lasting effects that pesticide residues have on a local ecosystem and that localized analysis of the environmental impact of pollutant discharges under the CWA is necessary, due to the toxic residues that remain after pesticide application, which FIFRA does not address.

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[10] Ibid., p. 48388.

[11] Ibid.

Additionally, activists say, FIFRA has no provisions for publicly accessible compliance information and no means of citizen enforcement in case of violations, as does the CWA. FIFRA essentially assumes users' compliance with restrictions on a pesticide's label.

Industry welcomed the thrust of the Interim Statement but also urged that it be broadened. Agricultural groups requested that EPA include other classes of applications under the guidance, such as aquaculture and crop production. Beyond the types of uses described in the proposed rule, some argue that EPA should additionally clarify that CWA permits are not required in the case of pesticides that are applied over land and then inadvertently impact waterbodies through drift and migration. Many of these commenters requested that EPA address the issues definitively in a rulemaking, rather than in non-binding guidance. In their view, without clear regulatory language supporting EPA's interpretation, pesticide applicators would still face the prospect of citizen lawsuits and NPDES permit requirements.

Many states and local governments, including agriculture agencies, irrigation districts, and mosquito abatement districts, strongly endorsed EPA's proposed clarification of its interpretation of the two laws. However, a few — especially states located in the jurisdiction of the federal Ninth Circuit — expressed a different view. The Oregon Department of Environmental Quality and California State Water Resources Control Board commented that the Interim Statement conflicts with legal precedent in the *Headwaters* case. They urged EPA, if it wishes to create an exemption for pesticide applications conducted in compliance with FIFRA, to ask Congress to amend the Clean Water Act and FIFRA accordingly.

Final Guidance and Proposed Rulemaking. In January 2005, 18 months after issuing the Interim Guidance memorandum, EPA issued final guidance in the form of an Interpretive Statement and Guidance and simultaneously proposed a formal rulemaking to codify the substance of the guidance in CWA regulations.[12]

The 2005 Interpretive Statement closely mirrors the July 2003 Interim Statement and Guidance. EPA modified the 2003 guidance in several minor ways, such as clarifying that compliance with "relevant requirements under FIFRA" refers to requirements relevant to protection of water quality and clarifying that the exclusion from permit requirements applies to control of pests on or above U.S. waters and pests near water, as well. The final Interpretive Statement does not endorse the expansion sought by some to clarify that CWA permits also are not required for pesticide applications to land and crops that may drift to nearby waterbodies.

Press reports indicated that EPA termed the final policy an "interpretive statement" rather than "guidance" in an effort to get more deference from the courts when agency policies face legal challenge. Many expect the policy and final rule, if one is issued, to be challenged, and EPA also hopes that, because the agency

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[12] U.S. Environmental Protection Agency, "Application of Pesticides to Waters of the United States in Compliance With FIFRA, proposed rulemaking and notice of interpretive statement," 70 *Federal Register* 5093, Feb. 1, 2005.

solicited public comments on the 2003 Interim Statement, courts will give deference to the final policy.[13]

The second portion of EPA's January 2005 action, proposing a rulemaking to codify the Interpretive Statement, would modify EPA rules (40 CFR §122.3) to specify that NPDES permits are not required for the application of pesticides to U.S. waters consistent with all relevant requirements under FIFRA in order to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited to U.S. waters. EPA rules currently do not address the relationship of the two laws on this issue. The public comment period on the proposal closed April 4, 2005, and EPA expects to finalize the rule by early 2006.

The CWA allows states to adopt water quality policies and rules more stringent than EPA requires. As noted above, some stakeholders fear that, so long as EPA's policy is articulated just as guidance, states could choose to require CWA permits for pesticide application. Thus, one rationale for formalizing the EPA policy in a rule is presumably to restrict that possibility. In the 2005 Interpretive Statement, the agency said that, under this interpretation, "a pesticide applicator is assured that complying with relevant requirements under FIFRA will mean that the activity is not also subject to the distinct NPDES permitting requirements of the CWA."[14] However, EPA also noted that the policy does not preclude states from further limiting the use of a particular pesticide in order to address local water quality concerns. Some may see these two statements as being somewhat inconsistent.

In comments on the 2003 interim guidance, a number of critics argued that EPA's interpretation of the two laws represented a reversal of positions the agency had taken in the *Forsgren* case when it supported environmentalists' appeal of the district court's original ruling. In its amicus brief in that case, EPA stated that the regulatory review required by each of the statutes is different and considers different factors and that FIFRA does not take into account all factors needed to judge whether a particular pesticide discharge should be permitted under the CWA. Responding to those points, the EPA General Counsel issued a memorandum contemporaneously with the January 2005 actions to explain some of those prior statements. The memorandum acknowledged that there could seemingly be inconsistencies in previous government positions but that, on detailed examination, differences are based on the specific facts of that litigation, not the general policies now being addressed. Moreover, in the current context, the Interpretive Statement fully reflects "the exercise of the Agency's legal and policy judgment after considering public comments" and "the evolution in the Agency's thinking in certain respects since the brief was filed in that case."[15]

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[13] Susan Bruninga, "Discharge Permit Not Needed for Application of Pesticides, EPA Proposed Rule, Policy Say," *Daily Environment Report*, Jan. 27, 2005, p. A-9.

[14] 70 *Federal Register* 5100.

[15] Ann R. Klee, EPA General Counsel, "Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA," Memorandum, Jan. 24, 2005, pp. 1-2.

Congressional Interest and Future Options

Congressional interest in these issues became apparent after the first federal appeals court ruling in one of the key FIFRA-CWA cases, the 2001 *Headwaters v. Talent* ruling. Two congressional hearings held since then focused on implications of the cases for pesticide use generally and for local governments' efforts to control mosquito-borne illnesses such as West Nile Virus. A hearing also has been held on legislation that has been introduced in the 109th Congress to clarify the scope of the CWA regarding the use of FIFRA-approved pesticides, fire retardants, and biological control organisms.

In October 2002, the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment held a fact-finding hearing on the issues. The subcommittee's particular concern derived in part from the fact that one of the key practices used to manage stormwater runoff, which is regulated under the Clean Water Act, is to collect and hold it in retention ponds, basins, drainage ditches, etc. Such practices can be at odds with the public health objective of controlling insect-breeding habitat by eliminating or draining sources of standing water. Stormwater management practices typically allow collected water to drain slowly, while public health efforts would prefer that it be removed quickly. Another way to address the public health concerns is to spray pesticides on stormwater management structures and other areas of standing waters. The question for this subcommittee was the uncertainty raised by the litigation over the CWA-FIFRA issues for communities, industries, and others needing to maintain stormwater control systems. An EPA official, while acknowledging that the issue of CWA jurisdiction over pesticide spraying is "new territory" for the agency, said that EPA believes there is no inherent conflict between protecting water quality and preventing mosquito-borne disease. At the hearing, Members and public witnesses urged EPA to provide guidance to resolve uncertainties raised by the court rulings.

A hearing held by the House Government Reform Committee's Subcommittee on Energy Policy, Natural Resources and Regulatory Affairs in October 2004 examined challenges to controlling West Nile Virus. The hearing was an opportunity for some Members and witnesses to express the view that EPA's July 2003 interim guidance, while helpful in clarifying EPA's position, does not provide sufficient legal certainty, since it does not bind non-federal entities or bar citizen lawsuits. Witnesses said that EPA's guidance is a nonbinding legal document that would not deter filing of citizen lawsuits seeking to impose a permit requirement. Supporters of this view urged EPA to settle the legal questions through a formal rulemaking to revise CWA rules, as EPA subsequently did propose in January 2005. Others at this hearing agreed on the need for a formal rulemaking, but said that in doing so, EPA should reverse the interpretation detailed in the guidance, not codify it.

In the 108th Congress, Senate appropriators included language in their report on EPA's FY2005 budget that called on EPA to finalize the interim guidance by

December 2004 and to clarify the long-standing distinction between agriculture and silviculture activities that do and do not require CWA permits.[16]

In 2003, a number of House and Senate Members urged the Bush Administration to support Supreme Court review of the *Forsgren* case, but ultimately the Administration did not endorse industry's request for a review, and the Court did not grant certiorari. Some Members of Congress also submitted comments in support of the July 2003 interim guidance document and the January 2005 regulatory proposal.[17]

Options for EPA and Congress. EPA's current options involve both the Interpretive Statement and proposed rulemaking. After reviewing the public comments, EPA could move forward with a final rule to promulgate a CWA regulation conforming with the Interpretive Statement. Or, EPA could revise the proposed regulatory language, either to narrow or to expand a permit exception. If EPA does issue a final rule in early 2006, as agency officials have said is likely, a narrower interpretation than what was proposed seems highly unlikely, based on the agency's consistently held view and the wide support that it received in comments on the 2003 interim guidance statement. Judicial challenges to a rule, if issued, can be anticipated and will presumably address many issues previously addressed by the courts in litigation discussed in this report.

Alternatively, the agency could elect to rely entirely on the January 2005 guidance document and not finalize a CWA rule, although such a choice would presumably be least satisfactory to many in the regulated community. EPA is not under any statutory or judicial mandate to adopt a rule. In either case, EPA seems to have some doubt that a rule would end the debate over the need for permits. At the October 2004 House subcommittee hearing, an EPA official said that even if EPA does promulgate a rule, states will still have the discretion to continue to require non-NPDES permits, and a formal rule would not preclude citizen lawsuits from seeking to force localities to file for permits. EPA made these same points in the January 2005 Interpretive Statement, as noted above.

An entirely different option would be for EPA to reverse course and change its long-standing interpretation of the two laws, thus agreeing that CWA permits are required for pesticide applications in, on, or near waterbodies. Again, EPA seems unlikely to pursue this option on its own initiative. If CWA permits were to be required, one option for minimizing the regulatory burden on permit writers and the regulated community is to utilize general permits, rather than individual permits. However, some industry groups are uncertain about the utility of such an approach, fearing that if broadly applicable general permits are issued, they likely would be challenged by opponents as inadequate.

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[16] U.S. Senate, Committee on Appropriations, "Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Bill, 2005," report to accompany S. 2825, 108th Cong., 2d sess., pp. 110-111.

[17] Materials included in the EPA docket, No. OW-2003-0063, including submissions by Members of Congress, can be found on EPA's website, at [http://docket.epa.gov/edkpub/do/EDKStaffCollectionDetailView?objectId=0b0007d480178caf].

Regardless of the actions that EPA takes with respect to the guidance and proposed rulemaking, a related issue is EPA's implementation of FIFRA and procedures used to evaluate the risks of pesticides during the registration process. Environmentalists have argued for some time that EPA's risk review procedures are inadequate because they fail to account for synergistic and additive effects, as well as sub-lethal and indirect effects of pollutants on the environment. In 2003, EPA convened a task force of officials from its pesticide and water quality offices to explore, among other things, whether the agency's pesticide review processes are protective enough to meet water quality standard limits. One outcome of the task force's review could be changes to FIFRA implementation in order to address some of these concerns.

Congress has several options, too, such as conducting further oversight of the issues. Other options could involve legislation to revise the CWA and or FIFRA, and some have expressed the view that EPA should ask Congress to legislate a resolution of these possible conflicts. Environmental activists, of course, would favor clarifying that permits are required, since they believe that EPA's approach in the guidance and proposed rule is unlawful.

Alternatively, Congress could enact legislation to clarify that permits are not required for some or all pesticide spraying activity, as favored by members of the pesticide application industry and others, since many of these stakeholders believe that the EPA guidance does not provide adequate protection from citizen suits. Legislation intended to do so has been introduced in the 109th Congress (H.R. 1749 and S. 1269, the Pest Management and Fire Suppression Flexibility Act). These bills would provide that NPDES permits are not required for use of FIFRA-approved pesticides; chemicals, fire retardants, or water used for fire suppression; biological organisms used for plant pest or weed control; or silviculture activities such as timber harvesting that are not currently regulated as point source activities. As previously discussed, EPA's final guidance and proposed rulemaking address situations in which pesticides are put directly in waters to control pests (e.g., controlling mosquito larvae or aquatic weeds) or cases of pesticides that are present over water and a portion of the pesticide is deposited in the water (e.g., aerial application to a forest canopy where waters of the United States may be present below the canopy). The pending legislation, in addition to codifying these policies, also addresses other broader circumstances that EPA so far has declined to include in its proposed rulemaking: applications over land areas that may drift over and into waters of the United States, broad exemption of activities for preventing or controlling plant pests or noxious weeds, and use of fire retardants.[18]

On September 29, 2005, the House Transportation and Infrastructure Subcommittee on Water Resources and Environment held a hearing on H.R. 1749. Witnesses representing a number of sectors that are pesticide users (state foresters, western irrigation districts, and farmers) testified in support of the legislation, saying that it would resolve existing legal uncertainties about permitting. An EPA witness

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[18] Reflecting a different approach, Rep. Goodlatte introduced a bill in the 107th Congress, H.R. 5329, that proposed amending FIFRA to expand the definition of what constitutes a "public health" pesticide in an effort to ease industry's ability to register pesticides for use in combating mosquito-borne illnesses.

said that the agency's proposed rulemaking seeks to reduce current uncertainty about the relationship between FIFRA and the CWA. The pending legislation similarly seeks to clarify the interaction between the two laws, this witness said, noting the other types of uses addressed in the legislation but not in the rulemaking, such as spray drift. The EPA official did not expressly endorse the legislation, but he said that EPA appreciates congressional efforts to reduce potential confusion over these issues.

Many environmental advocates believe that legislation is not needed because, in their view, the CWA is clear enough that permits are required for discharge of pesticides from point sources. What is needed, in their view, is for EPA to reject both the current guidance and the proposed rule and to revise its interpretation of the laws in accordance with judicial rulings. At the same time, many who would favor legislation supporting a narrow view of the CWA's jurisdiction acknowledge that any legislative effort would be controversial and could be seen as representing not clarification but, rather, an environmental rollback.